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February 5, 2007

Selma Sierra -State Director  
Utah State Director, Bureau of Land Management  
440 West 200 South, 5<sup>th</sup> Floor  
P.O. Box 45155  
Salt Lake City, Utah 84145-0155

*Re: Protest of Bureau of Land Management's Notice of Competitive Oil and Gas  
Lease Sale Concerning 14 Parcels*

Greetings,

In accordance with 43 C.F.R. §§ 4.450-2 and 3120.1-3, the Southern Utah  
Wilderness Alliance, Natural Resources Defense Council, The Wilderness Society, and  
the National Trust for Historic Preservation<sup>1</sup> (collectively referred to as "SUWA") hereby  
timely protest the February 20, 2007 offering, in Salt Lake City, Utah, of the following  
14 parcels in the Cedar City and Moab field offices:

**Cedar City field office: UT 0207-27, UT 0207-038, UT 0207-39, UT 0207-40,  
UT 0207-41, UT 0207-42, UT 0207-43, UT 0207-53 (8 parcels)**

**Moab field office: UT 0207-129, UT 0207-130, UT 0207-131, UT 0207-132,  
UT 0207-133, UT 0207-134 (6 parcels)**

As explained below, the Bureau of Land Management's (BLM's) decision to sell the 14  
parcels at issue in this protest violates the National Environmental Policy Act, 42 U.S.C.

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<sup>1</sup> The National Trust for Historic Preservation joins this protest only as to the following 8  
parcels in the Cedar City field office: UT 0207-27, UT 0207-038, UT 0207-39, UT 0207-  
40, UT 0207-41, UT 0207-42, UT 0207-43, and UT 0207-53.

§§ 4321 et seq. (NEPA), the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq. (NHPA), and the regulations and policies that implement these laws.

SUWA requests that BLM withdraw these 14 lease parcels from sale until the agency has fully complied with NEPA and the NHPA. Alternatively, the agency could attach unconditional no-surface occupancy stipulations to each parcel and proceed with the sale of these parcels.

The grounds of this Protest are as follows:

**A. Leasing the Contested Parcels Violates NEPA**

**1. Inadequate Pre-Leasing NEPA Analysis: Failure to Adequately Consider the No-Leasing Alternative**

NEPA requires that the BLM prepare a pre-leasing NEPA document that fully considers and analyzes the no-leasing alternative before the agency engages in an irretrievable commitment of resources, i.e., the sale of non-no surface occupancy oil and gas leases. See Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d 1253, 1262-1264 (D. Utah 2006); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-30 (9<sup>th</sup> Cir. 1988) (requiring full analysis of no-leasing alternative even if EIS not required); Montana Wilderness Assoc. v. Fry, 310 F. Supp. 2d 1127, 1145-46 (D. Mont. 2004); Southern Utah Wilderness Alliance, 164 IBLA 118, 124 (2004) (quoting Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147, 1162 (10<sup>th</sup> Cir. 2004)). Importantly, BLM's pre-leasing analysis must be contained in its already completed NEPA analyses because, as the IBLA recognized in Southern Utah Wilderness Alliance, "DNAs are not themselves documents that may be tiered to NEPA documents, but are used to determine the sufficiency of previously issued NEPA documents." 164 IBLA at 123 (citing Pennaco, 377 F.3d at 1162).

The Cedar City DNA states that the 1976 Cedar City Oil and Gas Environmental Analysis Record (Cedar City EAR) “evaluated leasing and one alternative, to not allow leasing. . . . In 1986, the Record of Decision (ROD) for the CBGA RMP/EIS amended the [leasing] categories and lease stipulations established through the 1976 EAR.” Cedar City DNA at unpaginated 2. In short, the Cedar City field office is relying entirely on the Cedar City EAR for its alternative analysis and consideration of the no-leasing alternative. A review of the EAR, however, reveals that the “no-lease” alternative was summarily dismissed and was not, in fact, analyzed, considered, and evaluated. See Southern Utah Wilderness Alliance, 457 F. Supp. 2d at 1262-1264. The CBGA RMP/EIS contains no similar discussion or analysis of the no-leasing alternative. Rather, that document considered the “no-action” alternative which was a continuation of the leasing categories established in the Cedar City EAR. See CBGA PRMP/FEIS at 3-1 to 3-2 (discussion of no-action alternative: “The No Action alternative presents a continuation of present levels or systems of resource use and management. . . . Minerals: Existing oil and gas leasing categories would be retained.”). Similarly, the subsequent oil and gas NEPA analysis cited to in the Cedar City DNA – the Supplemental EA for Oil and Gas Leasing (1988) – did not analyze the no-leasing alternative, but simply carried forward the decisions made in the EAR that lands were available for leasing. Thus, BLM must defer leasing parcels UT 0207-27, UT 0207-038, UT 0207-39, UT 0207-40, UT 0207-41, UT 0207-42, UT 0207-43, UT 0207-53 until the agency prepares an adequate pre-leasing NEPA analysis.

Similarly, the Moab DNA cites to the Moab District 1976 EAR which allegedly “analyzed one alternative to not allow leasing.” See Moab DNA at 3. A review of that



EAR, however, reveals that the “no-lease” alternative was summarily dismissed and was not, in fact, analyzed, considered, and evaluated. See Southern Utah Wilderness Alliance, 457 F. Supp. 2d at 1262-1264. It is also clear from a review of the Grand RMP/EIS that BLM did not consider the no-leasing alternative during the RMP process, but rather only analyzed a range of alternatives from full production to no-action – the no-action alternative being continuation of the leasing categories established in the earlier EAR. See Grand DRMP/DEIS at 2-13 (“Continue present management for oil and gas under the category system described in Appendix R”).<sup>2</sup> In addition, the 1988 RMP Oil & Gas Supplemental environmental assessment – also cited in the Moab DNA – did not consider the no-leasing alternative. Thus, BLM must defer leasing parcels UT 0207-129, UT 0207-130, UT 0207-131, UT 0207-132, UT 0207-133, UT 0207-134 until the agency prepares an adequate pre-leasing NEPA analysis.

**2. BLM Failed to Take the Required “Hard Look” at Whether Its Existing Analyses Are Valid in Light of New Information or Circumstances.**

NEPA requires federal agencies to take a hard look at new information or circumstances concerning the environmental effects of a federal action even after an EA or an EIS has been prepared, and to supplement the existing environmental analyses if the new circumstances “raise[] significant new information relevant to environmental concerns.” Portland Audubon Soc’y v. Babbitt, 998 F.2d 705, 708-09 (9<sup>th</sup> Cir. 1993). Specifically, an “agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a ‘hard look’ at the environmental effects of [its] planned actions.” Friends of the Clearwater v. Dombeck, 222 F.3d 552,

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<sup>2</sup> Appendix R to the Grand DEIS/DRMP merely lists the “Oil and Gas Category Stipulations.”

557 (9<sup>th</sup> Cir. 2000). See Southern Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d at 1264-69 (discussing supplemental NEPA requirement in the context of oil and gas leasing and concluding that BLM acted arbitrarily by proceeding with oil and gas lease sale without first preparing supplemental NEPA analyses). NEPA's implementing regulations underscore an agency's duty to be alert to, and to fully analyze, potentially significant new information. The regulations declare that an agency "shall prepare supplements to either draft or final environmental impact statements if . . . there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added).

As explained below, the Cedar City and Moab field offices failed to take a hard look at new information and new circumstances that have come to light since BLM finalized the CBGA EIS/RMP, Grand EIS/RMP, and subsequent oil and gas EAs. See also Pennaco Energy, 377 F.3d at 1162 (explaining that DNAs determine whether "previously issued NEPA documents were sufficient to satisfy the 'hard look' standard," and are not independent NEPA analyses); Southern Utah Wilderness Alliance, 457 F. Supp. 2d at 1255-56 (discussing DNAs). In addition, to the extent that the Cedar City and Moab field offices took the required hard look, their conclusions that they need not prepare supplemental NEPA analyses was arbitrary and capricious.

*a. Parowan Gap Area*

The cultural resources report prepared by the Cedar City field office archaeologist for the February 2007 lease sale conclusively demonstrates that significant, new information about the importance of the Parowan Gap has only come to light in recent

years, well after BLM finalized the CBGA EIS/RMP in 1984. See Cultural Resources Report for February, 2007 oil and gas lease sale (attached in Appendix D to Cedar City DNA). Keeping firmly in mind that lease sale DNAs are not new NEPA documents and that they are intended only to document that previously prepared NEPA analyses sufficiently analyzed, considered and evaluated the impacts of oil and gas leasing and development to a host of natural and cultural resources, a review of the Cedar City archaeologist's report makes clear that BLM must defer leasing parcels UT 0207-27, UT 0207-038, UT 0207-39, UT 0207-40, UT 0207-41, UT 0207-42, UT 0207-43, UT 0207-53.

For example, much of the Cedar City archaeologist's report discusses the findings from a 1997 report – prepared 15 years after the CBGA EIS/RMP – and the previously undocumented importance of the Gap as an astronomical observatory. See Cultural Resources Report at unpaginated 7-8 (“To return to the [1997] ACRON work, and as alluded to above, the most remarkable thing to come out of the effort was the concept of the Gap as an astronomical observatory. . . . Given that these agricultural people were using the Gap as a solar/lunar observatory, a whole ‘Pandora’s Box’ of implications arise therefrom.”). See also id. (describing increase in traffic related to the “pig farms” west of Minersville and the impacts that traffic is having to the Gap and its resources). Perhaps most damning is the candid statement by the Cedar City archaeologist that “the National Register Property and the NSO area are tiny little things, and beyond question not large enough to address anyone’s concerns about the Gap.” Id. at 8 (emphasis added). Exacerbating the problem is that the CBGA EIS/RMP contains virtually no information



about the Gap and its importance and only designates 17 acres as open for leasing but with no-surface occupancy stipulations. See id. at 6.

In short, the new and significant information contained in BLM's own cultural resources report establishes that BLM must not offer these 8 leases, but rather must defer leasing until the agency prepares supplemental NEPA analyses.

b. Parcel UT 0207-129 – Hatch Wash Wilderness Inventory Area

BLM has arbitrarily determined that the sale of lease parcel UT 0207-129 – located in-part within the Hatch Wash WIA – is appropriate. Notably, the Moab DNA fails to even mention that a portion of UT 0207-129 (Section 1: Lot 4, SWNW) is within the WIA. As the recent decision in Southern Utah Wilderness Alliance v. Norton makes clear, BLM cannot offer the portion of this parcel that is located within the Hatch Wash WIA. 457 F. Supp. 2d at 1264-67 (holding that BLM arbitrarily sold leases in wilderness inventory areas).<sup>3</sup>

The Hatch Wash WIA was inventoried between 1996-99 by the BLM as part of the agency's larger Utah wilderness inventory and determined to contain the necessary wilderness characteristics as defined in the Wilderness Act, 16 U.S.C. §§ 1131 et seq., for potential entry into the National Wilderness Preservation System. See Utah Wilderness Inventory, at vii-ix (1999). As the BLM's wilderness inventory documentation explained:

The Secretary's instructions to the BLM were to "focus on the conditions on the disputed ground today, and to obtain the most professional, objective, and accurate report possible so we can put the inventory questions to rest and move on." [The Secretary] asked the BLM to

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<sup>3</sup> In 2003, the Moab field office revised BLM's 1999 Utah Wilderness Inventory but did not make any changes to the Hatch Wash WIA. See Moab Field Office, Revisions to the 1999 Utah Wilderness Inventory (BLM 2003).

assemble a team of experienced, career professionals and directed them to apply the same legal criteria used in the earlier inventory and the same definition of wilderness contained in the 1964 Wilderness Act.

Utah Wilderness Inventory, vii (emphasis added). As the result of this review, the BLM determined that its earlier wilderness inventories had failed to recognize 2.6 million acres of lands that met the applicable criteria in its prior reviews, including the Hatch Wash WIA. See State of Utah v. Babbitt, 137 F.3d 1193, 1198-99 (10<sup>th</sup> Cir. 1998) (discussing history of BLM's Utah wilderness inventories). Importantly, the Grand EIS/RMP – prepared after the 1978-80 wilderness inventory – did not reanalyze the wilderness characteristics of lands that were passed over for wilderness study area status. Rather, that plan and its accompanying NEPA analysis merely adopted the conclusion that lands not identified as WSAs did not contain wilderness characteristics.

As part of its 1996-99 wilderness inventory, BLM compiled comprehensive case files to support its findings that this WIA had wilderness characteristics, including numerous aerial and on-the-ground photographs, as well as a detailed narrative with accompanying source materials and SUWA incorporates these documents, located in the Utah State office, by reference to this protest. See also Utah Wilderness Inventory, 117 (Hatch Wash WIA). Based on the candid statements in these wilderness files that BLM's own Wilderness Inventory provided significant new information that has not been analyzed in existing NEPA documentation, it is clear that this parcel must be removed from the February 2007 sale list. BLM's failure to do so is a clear violation of NEPA because: (a) the 1996-99 wilderness inventory is undeniably new information, as BLM itself admits; (b) this wilderness inventory meets the textbook definition of what constitutes "significant" information; and (c) the sale of non-NSO leases constitutes an



irreversible and irretrievable commitment of resources and thus requires a pre-leasing EIS.

Moreover, BLM cannot credibly claim that it has ever taken a hard look at the impact that oil and gas development would have on the wilderness characteristics of the Hatch Wash area because the wilderness case files post-date all the NEPA analyses and accompanying land use plans relied upon by BLM here. At the time that those documents were prepared, the BLM did not know that these areas contained wilderness quality lands. Hence, the Grand RMP/EIS does not contain the type of site specific information about the wilderness characteristics of the Hatch Wash WIA that was provided in the BLM's own (and subsequent) wilderness inventory evaluation, nor could it analyze the impacts of energy development on those characteristics. That BLM's Grand RMP/EIS may have discussed in general terms the values of this area, is no substitute for the required hard look at the impacts of oil and gas development on wilderness characteristics. See Pennaco Energy, 377 F.3d at 1162 (explaining that DNAs determine whether "previously issued NEPA documents were sufficient to satisfy the 'hard look' standard," and are not independent NEPA analyses). In sum, BLM's own wilderness inventory evaluations and comprehensive case files constitute precisely the type of significant new information that requires additional environmental analysis before BLM approves the irreversible commitment of resources – the February 2007 lease sale.

*c.      Hatch Canyon Citizen Proposed Wilderness Unit*

The following six proposed lease sale parcels are all located in whole or in-part within the Hatch Canyon citizens proposed wilderness unit: UT 0207-129, UT 0207-130, UT 0207-131, UT 0207-132, UT 0207-133, and UT 0207-134. On several occasions

over the past five years SUWA has provided the Moab field office with significant new information concerning the wilderness resources located in these six parcels – information that post-dates the Grand EIS/RMP. The Moab DNA contains no mention whatsoever of SUWA’s information or the BLM’s analysis and consideration of that information. Without an adequate, detailed record to support its decision to offer these six parcels for lease – BLM’s decision will be overturned as arbitrary and capricious.

*d. Incorrect Lease Stipulation – Parcels UT 0207-129, UT 0207-130, UT 0207-131, UT 0207-132, UT 0207-133, UT 0207-134*

The Moab DNA states that because parcels UT 0207-129, UT 0207-130, UT 0207-131, UT 0207-132, UT 0207-133, and UT 0207-134 are located in the Canyon Rims Recreation Area, that BLM should attach a special Canyon Rims lease stipulation to protect visual resources. See Moab DNA at 3-4. The final sale list, however, erroneously attaches stipulation 144 (VRM III) – rather than stipulation 123 (VRM II and III) – to these six leases. BLM must correct this mistake before the lease sale or not offer these parcels.

**B. Leasing the Contested Parcels Violates the NHPA<sup>4</sup>**

As described below, BLM’s decision to sell and issue leases the 14 parcels at issue in this protest violates § 106 of the NHPA, 16 U.S.C. § 470(f) and its implementing regulations, 36 C.F.R. §§ 800 et seq.

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<sup>4</sup> To the extent that BLM’s issued Instruction Memorandum 2005-003 Cultural Resources and Tribal Consultation for Fluid Mineral Leasing, Oct. 5, 2004, is inconsistent with the Interior Board of Land Appeals’ decision in Southern Utah Wilderness Alliance, 164 IBLA 1 (2004) and the recently issued decision in Southern Utah Wilderness Alliance, IBLA 2004-124 (2007), BLM must comply with the IBLA’s interpretation of the agency’s duties under the NHPA. See 43 C.F.R. § 4.1(b)(3).

As Utah BLM has recognized for some time, the sale of an oil and gas lease is the point of “irreversible and irretrievable” commitment and is therefore an “undertaking” under the NHPA. See BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2); see also 36 C.F.R. § 800.16(y); Montana Wilderness Assoc. v. Fry, 310 F. Supp. 2d 1127, 1152-53 (D. Mont. 2004); Southern Utah Wilderness Alliance, 164 IBLA at 21-28. The NHPA’s implementing regulations further confirm that the “[t]ransfer, lease, or sale of property out of federal ownership and control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance” constitutes an “adverse effect” on historic properties. Id. § 800.5(a)(2)(vii) (emphasis added). See 65 Fed. Reg. 77689, 77720 (Dec. 12, 2000) (Protection of Historic Properties – Final Rule; Revision of Current Regulations) (discussing intent of § 800.5(a)(2)(iii)).

1. *Cedar City Field Office*

The Cedar City field office DNA and the office’s cultural resources report both assert a “no historic properties affected” determination for the sale of the following 8 parcels UT 0207-27, UT 0207-038, UT 0207-39, UT 0207-40, UT 0207-41, UT 0207-42, UT 0207-43, and UT 0207-53. This assertion is undercut by the field office archaeologist’s discussion of the perceived necessary accommodation between oil and gas development and cultural resources protection that drove his analysis and review:

When the Gap vis-à-vis leasing became an obvious, surprisingly widely expressed concern the recent spate of oil and gas work, some 10,636 acres, in six big lease parcels were deferred. This may or may have been enough area to address all concerns, but it was obviously way too much to suit industry, particularly following the investment in the large seismic program focused squarely on the area. Thus, all of the parcels showed up again on the Feb. 06 [sic] maps.



Since the initial deferrals [in 2005], BLM has been working with the Native Americans – as well as industry – in an attempt to find a position acceptable to all.

Cedar City DNA, Appendix D, Cultural Resources Report for February, 2007 oil and gas lease sale at unpaginated 8 (emphasis added). Indeed, the archaeologist's discussion about the potential effects from leasing is fundamentally incorrect because he attempts to bifurcate leasing from later development, though leasing without adequate consideration of indirect effects – and thus inadequate stipulations – opens the door for unanalyzed adverse effects.

Though BLM may have “carved out” a roughly 1800 acre area to be deferred from leasing (and its assertion that this 1800 acre area includes all “known” resources), neither the DNA nor the archaeologist's report contains any discussion or explanation about the potentially significant indirect effects of oil and gas extraction and development to the Gap. See 36 C.F.R. § 800.5(a)(1) (defining adverse effect to include direct and indirect effects); id. § 800.5(a)(2)(v) (Examples of adverse effects: “Introduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant historic features.”).

2. *Failure to Involve the Public – All Field Offices/All Parcels*

BLM has further violated the NHPA by failing to adequately consult with members of the interested public such as SUWA regarding the effects of leasing all the protested parcels. Such consultation must take place before the BLM makes an irreversible and irretrievable commitment of resources – in other words before the February 2007 lease sale. See Southern Utah Wilderness Alliance, 164 IBLA 1 (2004). The NHPA requires BLM to “determine and document the area of potential effects, as

defined in [36 C.F.R.] § 800.16(d),” identify historic properties, and to affirmatively seek out information from the SHPO, Native American tribes, consulting parties, and other individuals and organizations likely to have information or concerns about the undertaking’s potential effects on historic properties. 36 C.F.R. § 800.4(a). See Southern Utah Wilderness Alliance, 164 IBLA at 23-24 (quoting Montana Wilderness Assoc., 310 F. Supp. 2d at 1152-53). The NHPA further states that BLM shall utilize the information gathered from the source listed above and in consultation with at a minimum the SHPO, Native American tribes, and consulting parties “identify historic properties within the area of potential affect.” Id. § 800.4(b). See id. § 800.04(b)(1) (discussing the “level of effort” required in the identification process as a “reasonable and good faith effort to carry out appropriate identification efforts”).

In particular, where SUWA was closely involved in BLM’s decision in 2005 to defer to leasing essentially these same parcels near the Parowan Gap and recently requested consulting party status from BLM’s Cedar City office for the Parowan 2-D seismic project, it is simply inexplicable why BLM did not contact SUWA to discuss the instant leasing proposal.<sup>5</sup> Indeed, it is clear that BLM staff worked for some time with industry and Native American tribes to arrive at this “middle ground” proposal – and yet kept SUWA at arm’s length. This decision in no way meets the NHPA’s command – repeated in the Protocol – that the BLM “seek information” from organizations like SUWA “likely to have knowledge of, or concerns with, historic properties in the area.” 36 C.F.R. § 800.4(a)(3) (emphasis added). See Protocol § IV.C (“BLM will seek and

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<sup>5</sup> Moreover, it was SUWA who suggested that the field office archaeologist contact the Hopi Tribe regarding oil and gas leasing and development activities near the Parowan Gap – further evidence that BLM should have, but did not, consult with SUWA regarding this leasing proposal.

consider the views of the public when carrying out the actions under terms of this Protocol.”).<sup>6</sup>

Likewise, SUWA has been intimately involved in oil and gas leasing and exploration activities in the Hatch Wash area and recently submitted detailed comments on the proposed Hatch Canyon seismic project – including potential adverse effects to historic properties. As in the case of leasing near the Parowan Gap, BLM should have – but did not – “seek information” from SUWA regarding historic properties in the Hatch Wash area and the potential effects that leasing and development may have to such properties.

As BLM’s DNA forms plainly state, the DNA process is an “internal decision process” and thus there is no opportunity for the public to participate in the identification of known eligible or potentially eligible historic properties. Permitting public participation only at the “protest stage,” or arguing that the time period for seeking public input ended when BLM completed its dated resource management plans, is not equivalent to encouraging participation in an open NEPA process, and BLM should withdraw the 14 parcels in the Cedar City and Moab field offices that are the subject of this protest.

3. *Failure to Adequately Consult with Native American Tribes – Moab field office*

As in the recent decision from the IBLA - Southern Utah Wilderness Alliance, IBLA 2004-124, the record here does not demonstrate that the Moab field office adequately consulted with the Native American tribes. See Southern Utah Wilderness

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<sup>6</sup> Because the National Programmatic Agreement – which the Protocol is tiered from – was signed in 1997, well before the current NHPA regulations were put in place, it is questionable whether either document remains valid. This further reinforces the need for BLM to fully comply with the NHPA’s Section 106 process.



Alliance, IBLA 2004-124 at 12 (holding that BLM failed to meaningfully consult with Native American tribes). In short, the form letter that the Moab field office sent to various tribes suffers from the same flaw that the IBLA recently held to be fatal to BLM's consultation efforts. Thus, BLM must defer leasing parcels UT 0207-129, UT 0207-130, UT 0207-131, UT 0207-132, UT 0207-133, UT 0207-134 until the agency fully and adequately consult with Native American tribes.

#### **REQUEST FOR RELIEF**

SUWA requests the following appropriate relief: (1) the withdrawal of the 14 protested parcels from the February 20, 2007 Competitive Oil and Gas Lease Sale until such time as the agency has complied with NEPA and the NHPA or, in the alternative (2) withdrawal of the 14 protested parcels until such time as the BLM attaches unconditional no-surface occupancy stipulations to all protested parcels.

This protest is brought by and through the undersigned legal counsel on behalf of the Southern Utah Wilderness Alliance, the Natural Resources Defense Council, The Wilderness Society, and the National Trust for Historic Preservation. Members and staff of these organizations reside, work, recreate, or regularly visit the areas to be impacted by the proposed lease sale and therefore have an interest in, and will be affected and impacted by, the proposed action.



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